

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

JANETTE MARTIN,)	
Charging Party,)	HRC NO. 9301005578
)	
RUSSELL ANDERSON, d/b/a,)	FINDINGS OF FACT, CONCLUSIONS SPORTSMEN BAR
)	OF LAW AND FINAL ORDER
Respondent.)	
)	
)	
)	

In August 1992, Janette~Martin filed a charge with the Montana Human Rights Commission and against Russell Anderson doing business as the Sportsmen Bar. The complaint alleged that respondent had subjected charging party to sexual harassment and constructively discharged her as a result. In November 1992, charging party amended her discrimination complaint and added an equal pay claim alleging that respondent paid a similarly situated male employee more per hour because of his sex. Charging party alleged that respondent violated her rights under §49-2-303(1), MCA, while she was employed at the Sportsmen Bar.

The case was certified for hearing in February 1995. The hearing commenced on October 16, 1995, at the Council of Commissioners Room in the Silver Bow County Courthouse in Butte, Montana. By agreement of the parties, it was resumed and completed by telephone conference call on October 17, 1995. Hearing examiner Tim Kelly presided. Charging party was represented by attorney Timothy McKeon, Anaconda, Montana. Respondent was represented by attorney Jack Morris of Whitehall, Montana. The parties waived opening statements in the case. Closing arguments were timely filed in writing with the Commission and the record of the hearing on this matter was closed on November 9, 1995.

A proposed order was issued in favor of charging party on December 22, 1995. On January 17, 1996, respondent filed notice of intent to file exceptions and on April 11, 1996 filed exceptions to the proposed order.

After briefing by all parties, the Commission heard oral argument on June 4, 1996, at Helena, Montana. Charging party was represented by Steve Carey and respondent by John Hoffman. All Commission members were present, and indicated they had reviewed the record, consisting of the complaint, the contested case record, a transcript of proceedings and exhibits, the proposed order, the exceptions, and briefs of both parties on the exceptions.

I .

RULINGS ON EXCEPTIONS

Upon its review of the record, findings of fact, conclusions of law and proposed order as entered by the hearing examiner, and upon full consideration of the exceptions, and oral argument of both parties, the Commission makes the following rulings on respondent's exceptions:

Respondent's exception no. 1 is to the award of damages for emotional distress. Respondent asserts that there were no findings of fact to support the establishment of emotional distress damages. To the contrary, findings of fact 13 and 14, which are supported by charging party's uncontested testimony and demeanor as a witness, when combined with the numerous findings detailing the nature of the sexual harassment in this case, are sufficient to support an award of damages for emotional distress for sexual harassment. Exception no. 1 is overruled.

Respondent's exception no. 2 is to the award of damages for backpay during charging party's period of unemployment after her constructive discharge. Although the exception is not supported by any authority, respondent appears to challenge the award of backpay during a period when charging party was attending retraining for an alternative career. The hearing examiner evaluated charging party's decision to abandon her career in bartending as a result of the sexual harassment she experienced from respondent, and properly concluded that she was entitled to backpay during this period of retraining. The hearing examiner limited back pay to the amount of time the bar remained open until its destruction by fire. Exception no. 2 is overruled.

Respondent's exception no. 3 is to the hearing examiner's denial of a continuance to obtain the testimony of a witness who had evaded service of a subpoena. Upon its review of the record, the Commission is persuaded that the hearing examiner's ruling was correct. Respondent attempted service of the subpoena on this witness only one day before the hearing, which had already been continued earlier at respondent's request. Exception no. 3 is overruled.

The Commission adopts the findings of fact, conclusions of law and proposed order of the hearing examiner, as amended, as its final order.

II.

WITNESSES AND EXHIBITS

Charging party presented six witnesses in her case in chief: Sandra Seccomb, Linda Luetschaft, Cecilia Wyman, David Jenkins, Cindy Atkins and the charging party herself, Janette Martin. Respondent also presented six witnesses in defense against the charges: Dianna Rolando, Mike Reynolds, Bernie Rolando, David Jenkins, Cindy Atkins and the respondent himself, Russell Anderson.

Four exhibits were offered and admitted for the record. Exhibit CP-1 was offered by the charging party and admitted for demonstrative purposes only. Exhibits R-A, R-B, R-C were offered by respondent and admitted.

Charging party moved for sanctions against respondent for failure to produce wage and compensation records in a timely manner. The motion requested an order prohibiting the respondent from offering evidence that any employee wage disparities were for reasons other than sex. Respondent did fail to produce the requested wage records in accordance with prior orders of the hearing examiner, but sought to excuse such failure on grounds that the records were in the possession of a third party and not under control of respondent until immediately before the hearing.

The motion for sanctions was denied. Charging party was afforded an opportunity to request that the hearing be continued to allow any further inspection of the wage records deemed necessary. Charging party made no request to continue the hearing for that purpose.

III.

ISSUES OF LAW

1. While employed by respondent was charging party subjected to unlawful sexual harassment in violation of her rights under §49-2-303(1), MCA?
2. Did respondent pay charging party less wages and compensation than similarly situated male employees in violation of §49-2-303(1), MCA?
3. Is charging party entitled to any relief under §49-2-506(1)(b), MCA, and if so, in what amount and what form?
4. Is respondent entitled to dismissal of the charge pursuant to §49-2-507, MCA?
5. In the event respondent is found to have engaged in an unlawful discriminatory practice, is any affirmative relief necessary other than an order by the Human Rights Commission that the respondent refrain from engaging in such discriminatory conduct, as required by §49-2-506(1), MCA?

IV.

FINDINGS OF FACT

1. The charging party is Janette Martin. She is a resident of Billings, Montana.
2. The respondent is the Sportsmen Bar, a sole proprietorship owned by Russell Anderson. The principal place of business of respondent was Butte, Montana.
3. The Sportsmen Bar burned down at the end of November 1993 and is no longer in business. Respondent has retired from the tavern business.

4. Respondent employed charging party as a bartender at the Sportsmen Bar from 1988 until on or about August 12, 1992. At the time Janette Martin was hired by respondent, she had over 15 years experience as a bartender. While employed at the respondent's bar, charging party performed in a generally satisfactory manner.

5. Prior to June 1992, Janette Martin worked two day shifts and two night shifts at the bar each week. Each shift was nine hours long. Bartenders, including charging party, were then paid at the rate of \$7.00.

6. As owner of the Sportsmen Bar, Russell Anderson had a general work routine. During the day, Anderson would usually be at the Carousel Bar and Restaurant (hereafter the "Carousel") which he also owned and managed. Around 4:00-5:00 p.m., he would finish his work at the Carousel and go to the Sportsmen Bar. At the Sportsmen, he would do the books during the change in shifts for the bartenders. After he completed the account work, Anderson would have a few drinks at the bar, sometimes staying until well after 9:00 p.m. It was not unusual for him to have four or five drinks. His beverage of choice was a double shot of Beefeater's Gin.

7. Russell Anderson would frequently become intoxicated from his drinking at the Sportsmen Bar. Although respondent testified that his faculties were not impaired by his drinking habits, there was testimony from several former employees including the charging party, Sandra Seccumb, Linda Luetschaft, and Cecilia Wyman that Anderson regularly became inebriated when drinking at the Sportsmen. Respondent's own witnesses, Mike Reynolds and Dave Jenkins, acknowledged that they had seen Anderson intoxicated occasionally. In light of that testimony and the amount of alcohol respondent admitted using on a regular basis, Anderson's assessment of the effect of his drinking habits on his observable behavior in the workplace was not credible.

8. Janette Martin testified that when she worked at the Sportsmen Bar, Russell Anderson had a practice of touching female employees on the buttocks, rubbing their backside, draping his arm around their shoulders or around their waists, pulling an employee's dress over her head, and otherwise putting his hands on them in an inappropriate manner. Martin stated that Anderson only acted in that manner after he had been drinking and that the conduct became more frequent when he was intoxicated. She also testified that when she first started working,

the touching by Anderson was very sporadic, but later respondent began drinking more heavily at the bar and the frequency of his inappropriate conduct increased.

9. Charging party testified that she was touched by Anderson in an inappropriate manner on several occasions, including instances when he draped his arm around her waist, when he patted her on the buttocks, when he tried to kiss her on the lips saying "give poppa a kiss", and when he tried to force her to dance with him. Martin stated that in each instance she rebuffed the respondent's advances, telling him to "quit it" or "knock it off" or the equivalent, and that his response was to laugh at her.

10. According to the testimony of the charging party, the last incident when Russell Anderson harassed her occurred on August 10, 1992, when there was live music presented at the bar by the Rolandos band. Martin testified that on that occasion the respondent was drinking heavily, he positioned himself next to her when she was working behind the bar, and that he then reached down and grabbed her buttocks. Martin said she hit the respondent hard with her elbow to make him stop and then she moved to the other end of the bar to get away from Anderson.

11. The charging party testified that she complained the next day to Helen Hancock about Anderson's conduct on August 10, 1992. Hancock served in an administrative position for respondent. Martin said she also told the bar manager, Cindy Atkins, about the incident within a day or two.

12. On August 12, 1992, charging party terminated her employment at the Sportsmen Bar, advising Cindy Atkins that she could not work there anymore because of the conduct of Russell Anderson.

13. Janette Martin had difficulty testifying on the stand about the incidents when Russell Anderson approached her or touched her in an inappropriate manner. Martin described how respondent made her feel degraded and humiliated, especially in front of customers. She testified that she did not quit before the August 1992 incident, even though the conduct of respondent offended her, because she did not know how she would be

able to care for herself or her son without a job. She explained that she had been trying to put her experiences working for Anderson behind her for three years and had been unable to do so.

14. In relating her experiences working for respondent, charging party was visibly upset, at times unable to speak because she was making an effort, not always successful, to hold herself back from crying. Martin also described how she became worried when she witnessed Anderson touching other female workers and her concerns that he would approach her in the same manner. Charging party testified that the ordeal of working at the Sportsmen Bar had left her uneasy about being friendly with or getting close to people at work.

15. Sandra Seccomb worked as a bartender for respondent from January 1987 to the spring of 1992. While employed by respondent at the Sportsmen Bar, Seccomb often was relieved at the end of her shift by the charging party.

16. Seccomb testified that she usually saw Russell Anderson at the end of her work shift in the late afternoon. She confirmed that Anderson drank a lot when he was at the bar and concluded that he became intoxicated nearly every day. Seccomb described respondent as being "touchy-feely" with the women at work after he became inebriated. The witness stated that Anderson had a habit of putting his arms around female bartenders and informing them that "Poppa's getting drunk". Seccomb testified that she regularly saw respondent touch female customers and workers in a manner that she considered inappropriate and unwelcome. Seccomb never saw Anderson touch male patrons or male workers in a similar manner.

17. Sandra Seccomb testified that she observed Russell Anderson touching one of the workers, Janice Olsen, by running his hands over her backside and buttocks "and more", and that Olsen did not appear to find the conduct unwelcome. Seccomb testified that she avoided respondent when he was drinking and was not touched by him. She also stated that she did not see respondent touch the charging party in an inappropriate manner.

18. Seccomb was terminated from her employment at the Sportsmen Bar in 1992 for "having a bad attitude." Seccomb acknowledged that she did have a bad attitude about working for respondent.

19. Sandra Seccomb indicated that she did have some reluctance about testifying at the hearing and becoming involved in the case as a witness. She was however direct and forthcoming when answering questions and was credible in her testimony.

20. Linda Luetschaft worked at the Carousel bar and restaurant for 3 1/2 years. Luetschaft testified that while employed by respondent at the Carousel she often observed the respondent drinking and that he frequently referred to himself as "Poppa" after he began drinking.

21. According to Luetschaft, Anderson frequently would grab, pat, pinch or touch female employees at the waist, on the hips or elsewhere once he began drinking. She stated that respondent touched her on the buttocks on at least ten occasions and that she often told him to stop but his response was to laugh. The witness recalled one incident when Anderson had pinched her so hard that he had left deep bruises on her arm. Luetschaft also testified about another incident when the respondent asked her to come up to his "shack", meaning his residence, after work. She understood the invitation to be sexually suggestive.

22. Linda Luetschaft went to the Sportsmen Bar a couple times a month when she was working at the Carousel. She went to the bar to see performances by the Rolandos or to visit with the charging party, a friend. Luetschaft testified that the charging party would often complain about the respondent's conduct at the bar, that he touched her and other women working there and that it bothered her a great deal.

23. Luetschaft acknowledged that she often accepted respondent's standing offer of a free drink after work, would occasionally sit and drink with Anderson and was usually cordial to the bar owner. She denied that she ever welcomed or solicited respondent's conduct in pinching her or touching her or in making sexually suggestive comments.

24. Linda Luetschaft admitted that she was angry with Russell Anderson after he decided to close the Carousel and let the employees go. At the hearing, the witness also stated that she was no longer upset with respondent over the loss of the Carousel job.

25. Luetschaft was candid in her response to questions about losing her job at the Carousel. Her answers to those questions were credible as was her testimony in general.

26. Cecilia Wyman worked at the Carousel bar and restaurant from September 1990 to February 1992. Wyman is the charging party's sister.

27. According to Wyman, Russell Anderson began making sexual advances toward her approximately three months after she started working for him. She testified that at the end of 1990, he came up from behind her and pulled her skirt up. Wyman also testified that Anderson made efforts to pull her dress up above her waist on other occasions and that he also would put his hands on her face and try to force her to kiss him. Wyman described respondent's conduct as disgusting. She denied initiating any physical conduct with respondent and stated his advances were neither welcome nor solicited. She also denied ever having any sexual relationship with Russell Anderson.

28. Cecilia Wyman also testified at the hearing that she often observed respondent touching other female workers in an inappropriate manner. Wyman stated that her sister would also complain to her about Anderson's conduct toward female workers at the Sportsmen Bar.

29. Two of Wyman's fellow workers at the Carousel, Mike Reynolds and Dave Jenkins, testified that Cecilia Wyman often acted in a sexually aggressive manner. Jenkins testified that Wyman once "flashed" him, opening her blouse in front of him when the two were alone at work. Wyman often socialized with Russell Anderson, drinking with him after work. According to respondent, Anderson and Wyman did have sexual relations on one occasion, staying together overnight. In light of that testimony, particularly from the coworkers, and considering the demeanor of Cecilia Wyman on the stand, her testimony claiming she did not solicit or participate in sexual conduct at the workplace and that she found Anderson's behavior "disgusting" and unwelcome was not credible.

30. Mike Reynolds worked as a cook at the Carousel bar and restaurant from 1990 to 1992. Reynolds testified that he did not see respondent engage in any inappropriate touching or other conduct toward female

workers. He acknowledged that from his usual vantage point in the kitchen, he did not have a continuous opportunity to observe respondent's interactions with female workers, particularly when the establishment was busy.

31. Dave Jenkins worked at the Carousel bar and restaurant as a cook and bartender. He later worked for respondent at the Sportsmen Bar as a bartender. Jenkins testified that he did not see respondent touch charging party or other female workers in an inappropriate manner.

32. Cindy Atkins worked at both the Carousel and the Sportsmen Bar for respondent for several years. Atkins and Anderson are close friends. When Anderson asked Atkins to take over the management of the Sportsmen Bar beginning in June 1992, she accepted.

33. Cindy Atkins testified that charging party did complain to her that Russell Anderson had been feeling up and down her body when she was working on August 10, 1992. In response to the complaint, Atkins called Dianna and Bernie Rolando who were also working at the bar with their band on that day. According to Atkins, both of the Rolandos said Anderson did not act as charging party had described. Atkins also talked to respondent himself who denied the complaint.

34. Bernie Rolando testified at the hearing that he had no recollection of seeing Janette Martin upset on August 10, 1992, that he did not see respondent touch the buttocks of the charging party, that he did not hear female employees complain about the conduct of Russell Anderson and that he could not recall any phone conversation with Cindy Atkins regarding a complaint of sexual harassment by charging party. Mr. Rolando did explain that he worked as a musician at the Sportsmen Bar on a regular basis. His description of his work indicated that, while working, he would not have been watching the respondent, the charging party or any other individual closely.

35. Dianna Rolando testified at the hearing that she recalled seeing both the respondent and the charging party on August 10, 1992, but did not see Anderson touch Martin on the buttocks or engage in any other inappropriate conduct. Rolando indicated that the bar was very crowded at the time.

36. From her vantage point, Dianna Rolando judged working conditions at the Sportsmen to be "looser" than in other employment circumstances. She described the employer-employee relations there as similar to an "extended family".

37. Mrs. Rolando testified that she did see Russell Anderson touching and hugging female employees, including the charging party, but the witness did not consider the conduct inappropriate or unwelcome in that setting. Mrs. Rolando reported that she did not hear of any complaints about the conduct of respondent, with the exception of the inquiry made by Cindy Atkins in August 1992. Dianna Rolando also acknowledged that Anderson occasionally would put an arm around her shoulders, even pat her on the buttocks, but she did not find that behavior offensive or anything more than a friendly gesture.

38. Cindy Atkins testified that respondent's conduct in touching, hugging, pinching or even patting the buttocks of female workers appeared to be part of a friendly and playful relationship between the bar owner and his employees. Atkins stated that the bar business is a different work environment than other workplaces and determining whether such conduct is inappropriate in a bar depends on the degree of friendship of the persons involved.

39. Neither Cindy Atkins nor any other witness testified that Janette Martin had a playful relationship with Russell Anderson or that Anderson and Martin were friends.

40. There was no evidence that Cindy Atkins had decided to take action regarding the complaint about Russell Anderson's conduct in August 1992 in order to prevent any similar incidents in the future or that Atkins had any authority to take any action against the bar owner.

41. There was no evidence that respondent had a policy prohibiting sexual harassment of employees at the Sportsmen Bar or a grievance procedure advising employees how and to whom any complaints should be made.

42. Cindy Atkins confirmed that charging party called and advised that she was quitting her job on August 12, 1992. According to Atkins, Martin said that she was not happy with her work and was getting out of the bar business. Atkins understood charging party was not happy with the \$5 per hour wage rate she was then being paid.

43. Russell Anderson testified that he did kiss certain female employees and did place his arms around them on occasion, but only in a friendly manner. He admitted that he did not touch male employees or male patrons in the same manner. Anderson also acknowledged that he did pinch Linda Luetschaft, but claimed it was only in response to her pinching him. He was unable to recall whether he ever kissed Luetschaft. In answer to a question about whether he had patted female workers on the buttocks, respondent replied "not to my knowledge". He denied ever referring to himself as "Poppa".

44. Anderson testified that Janette Martin was the one female employee he touched the least, acknowledging that he touched other female workers more, particularly Janice Olsen whom respondent considered to be the biggest "flirt." Respondent testified he had no recollection of charging party telling him to "knock it off" after he had touched her and no recollection of her elbowing him after he had touched her. He denied he ever touched her or any other female worker in an inappropriate manner and stated that none of the women that had worked for him had ever complained about his conduct until charging party accused him of harassment in August 1992.

45. Respondent acknowledged in his testimony that he never took any disciplinary action against charging party while she was employed at the Sportsmen Bar.

46. In June 1992, the wage rates of bartenders at the Sportsmen Bar, including the charging party, were reduced from \$7.00 per hour to \$5.00 per hour. At the time the wage rates were reduced, only women were

employed as bartenders at the Sportsmen Bar. The decision to reduce the bartenders' wage rate was made by Cindy Atkins, acting under the authority and with the approval of Russell Anderson.

47. Shortly after the bartender wage rates were reduced, Dave Jenkins was hired at the Sportsmen Bar. His wage rate was set at \$6.00 per hour.

48. Cindy Atkins testified that she made the decision to hire David Jenkins as a bartender and to pay him \$6.00 per hour because she needed someone that she could trust.

49. Jenkins testified at the hearing that he performed the same duties and responsibilities as any other bartender working at the Sportsmen Bar.

50. After leaving her job with respondent in August 1992, charging party looked for work at WalMart, KMart, Albertson's and other grocery and retail stores. She continued to look for employment outside the bar business through the remainder of 1992. In January 1993, she enrolled at the local Vocational Technical College and remained a full time student through May of 1995 when she completed her job training program.

VI.

OPINION

The Montana Human Rights Act prohibits workplace harassment based on gender. X49-2-303, MCA; *Harrison v. Chance*, 797 P.2d 200, 204 (Mont. 1990). If an employer sexually harasses a worker, or tolerates or condones such conduct, then the employer is liable for the resulting harm. *Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993).

To prevail on a hostile environment sexual harassment claim, a charging party must prove that (a) she is a member of a protected group; (b) she was subjected to sexual advances, requests for sexual favors or other sexual conduct in the workplace; (c) the sexual conduct was unwelcome to her; (d) the conduct was sufficiently severe or pervasive to alter the terms or conditions of employment of a reasonable person and to create an abusive environment; and (e) the employer knew or should have known of the conduct and failed to take effective

action to prevent or stop it. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-68 (1987), quoting with approval the EEOC Guidelines at 29 CFR §1604.11; *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514-1515 (9th Cir. 1989).

Determining whether a work environment is "hostile" and a violation of the law depends on the totality of circumstances. Relevant considerations include, but are not limited to, the frequency of the offensive conduct, its effect on performance, the extent to which it is threatening or humiliating or otherwise disruptive of an employee's well being, and any other factors indicating that the working conditions would be abusive to a reasonable person. *Harris v. Forklift Systems Inc.*, 14 S.Ct. 367, 371 (1993). "No single factor is required." *Id.* at 371. In this case, each element of Janette Martin's claim that she was sexually harassed while employed at the Sportsmen Bar was supported by substantial proof.

The evidence presented at the hearing clearly established that Russell Anderson had a pervasive habit of touching female employees on the shoulders, arms, hips, waists, lips and buttocks while they were working. The conduct was sexual in nature. In one instance, it culminated in sexual relations between Anderson and an employee. In another instance, respondent evaluated the appropriateness of his conduct based on how much he considered a particular woman to be a "flirt." Moreover, it was undisputed that the type of physical contact respondent had with his workers was based on gender. Anderson limited his hugging, kissing, pinching and rubbing activities to the women who worked for him.

The evidence also established that Janette Martin did not welcome or solicit physical contacts with Russell Anderson. She told him to stop and to "knock it off" when he touched her in an inappropriate manner. She elbowed him when he grabbed her buttocks in the incident in August 1992. Respondent knew Martin found his behavior improper. Anderson testified that he touched charging party less than any of the other female workers. He also admitted that Martin was not, in his parlance, a "flirt."

The evidence of the working conditions at the Sportsmen Bar was also sufficient to establish the final element of charging party's claim of sexual harassment, that the work environment was abusive to such an extent that it altered the terms and conditions of charging party's employment. Anderson acted with an apparent assumption that he could take liberties with women because they were his employees. His sexually suggestive comments and physical contacts with female workers, often touching intimate body parts, were inappropriate. He engaged in that conduct openly, in front of other workers, in front of customers of the bar. His response when someone told him to stop was to laugh. He was unable to comprehend that a woman who told him to stop touching her was making a complaint.

Janette Martin's response to that conduct was not unreasonable. When she was the target, she felt degraded, humiliated and disrespected, particularly since it took place in front of patrons. When others were the target, she was afraid that Anderson might soon turn his attention on her. Responding to Anderson's boorish and assaultive behavior should not have been part of the job duties and responsibilities for women working at the Sportsmen Bar, but it was.

The respondent's argument that a tavern environment somehow justifies Russell Anderson's conduct and immunizes him from liability is without merit. Obtaining a license to sell liquor or to run a bar does not give an employer permission to disregard state laws prohibiting sexual harassment in the workplace. In this type of case especially, where the owner of the establishment is the harasser, the fact that alcoholic beverages are served on the premises as part of the business is not a mitigating factor and provides no excuse for the respondent's unlawful and discriminatory practices.

The evidence having established that Russell Anderson created and fostered a working environment at the Sportsmen Bar that was hostile toward women, including the charging party, a separate question is presented concerning whether Janette Martin was constructively discharged by respondent in August 1992. Again, the analysis of whether a constructive discharge occurred is based on the "totality of the circumstances" and must be

supported by more than the claimant's subjective point of view. *Martinell v. Montana Power Co.*, 886 P.2d 421, 435 (Mont. 1994), citing *Snell v. Montana-Dakota Utilities Co.*, 643 P.2d 841 (Mont. 1982).

Several factors support the conclusion that charging party's decision to end her employment with respondent in August 1992 was reasonable and proper. Anderson's improper conduct toward female employees was routine. There was evidence that the frequency of that conduct was increasing along with his heavy drinking. There was no policy against harassment, no procedure for complaining. Charging party's efforts in that regard, through Helen Hancock and Cindy Atkins, proved fruitless. Moreover, even if there had been a grievance procedure, Anderson was owner of the bar. There were no assurances that he would treat a complaint directed at him fairly.

Janette Martin's decision not to quit earlier because of the prior incidents of harassment does not undermine her claim of a constructive discharge in August 1992. Any worker subject to a continuing course of discrimination faces a difficult conflict between leaving her job to avoid the discriminatory practices and keeping their position and the ability to support themselves and her family. Over time, however, the response to the treatment may change, particularly when working conditions do not improve. The evidence in this case shows no improvement in Russell Anderson's conduct as of August 1992. The specific incident of harassment of the charging party on August 10, 1992, coupled with her unsuccessful efforts to seek relief from her immediate supervisors, supports a finding that conditions at the Sportsmen Bar had become intolerable for Janette Martin and that she was constructively discharged by respondent at that time.

Finally, the evidence at the hearing clearly supported charging party's equal pay claim. It was undisputed at the hearing that respondent paid female bartenders a wage of \$5.00 per hour beginning in June 1992. It was also undisputed that respondent paid its only male bartender, Dave Jenkins, \$6.00 per hour during the same period.

In defense against the charge, the bar manager, Cindy Atkins, claimed that Jenkins was paid more because she needed someone on staff that she could trust, suggesting that Jenkins had some additional skill, effort or

responsibility that was not imposed on the other bartenders and that the pay disparity was not gender based. See: *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), discussing the defenses to claims made under the federal Equal Pay Act, 29 U.S.C. §206(d)(1)(i)-(iv)).

Respondent's defense in this case fails however in light of the unequivocal testimony by Jenkins at the hearing that he had exactly the same duties and responsibilities as any other bartender at the Sportsmen Bar. By Jenkins' own admission, there was no factual basis for concluding that he had any greater skill, exerted any greater effort or had any higher responsibility than female bartenders working at the bar.

Having found that respondent Russell Anderson unlawfully discriminated against Janette Martin by subjecting her to sexual harassment in the workplace, by denying her equal pay because of her sex, and by constructively discharging her from her position, the Commission is obliged to order the respondent to refrain from such conduct and may require such other affirmative relief as is necessary to prevent future violations. §49-2-506(1), M.C.A. The Commission will also award relief to the charging party to rectify the harm, including loss of wages and emotional harm, caused by the discriminatory conduct. §49-2-506(1)(b), M.C.A.; *P. W. Berry Co., Inc. v. Freese*, 239 Mont. 183, 779 P2d 521 (1989) (back pay award to include amounts for lost wages and benefits, plus prejudgment interest); *Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993) (\$20,000 award for emotional harm caused by sexual harassment).

Charging party has requested the sum of \$30,000 as compensation for the emotional distress she suffered as a result of the hostile work environment at the Sportsmen Bar. Considering the pervasiveness and offensiveness of Russell Anderson's conduct as owner of the Sportsmen Bar, the humiliating effect that conduct had on the charging party, the long term impact of that conduct on charging party's ability to relate to coworkers, its apparent influence on her decision to leave an occupation where charging party had nearly 20 years of experience, and its lingering effects on her emotional state as exhibited at the hearing, the sum of \$10,000 is

adequate compensation for the significant emotional harm Janette Martin suffered as a result of the sexual harassment by the respondent.

As a result of the equal pay violation, charging party is entitled to \$1.00 per hour in additional wages for the period from June 1, 1992 through her termination on August 12, 1992. Based on her work schedule of 36 hours per week, the total amount due charging party is \$360 in additional wages for that 10 week period, plus \$122 as prejudgment interest calculated at the rate of 10% simple interest per annum.

As a result of the constructive discharge, charging party is also entitled to an award for loss of wages from August 12, 1992, through the date that the Sportsmen Bar was closed as a result of a fire on October 31, 1993. Charging party exercised due diligence in seeking alternative employment from the time she left the Sportsmen Bar through the end of 1992 by seeking jobs at a variety of retail and department stores in the local job market. When those efforts proved unsuccessful, it was appropriate and necessary for Martin to enroll in a vocational training program in order to obtain skills and knowledge to compete in the job market. The evidence was sufficient to establish that the decision to abandon her 20 year career as a bartender would likely not have been made but for her work experiences at the Sportsmen Bar. As discussed above, the emotional impact of that employment was sufficiently serious to compel her to leave the tavern business.

Based on a rate of \$6.00 per hour and a work schedule of 36 hours per week, charging party is entitled to an award of \$13,608 for the loss of wages during the period from August 12, 1992 through October 31, 1993. In addition, Martin is entitled to the sum of \$3,798 as prejudgment interest on that sum at the rate of 10% simple interest per annum.

In light of the fact that respondent is no longer in the tavern business and the absence of evidence indicating he is an employer in any business, no additional affirmative relief is necessary other than an order that Russell Anderson not engage in any future violations of the Montana Human Rights Act.

VII.

CONCLUSIONS OF LAW

1. Respondent Russell Anderson created, maintained, tolerated and condoned a hostile work environment at the Sportsmen Bar in Butte, Montana, which discriminated against the charging party in the terms and conditions of her employment because of her sex and caused the termination of her employment on August 12, 1992, in violation of X49-2-303, MCA.

2. Respondent Russell Anderson failed to pay charging party the same wages as a similarly situated male employee because of her sex and in violation of her rights under X49-2-303, MCA.

3. Charging party is entitled to the sum of \$14,040 in lost wages and compensation, plus \$3,920 in prejudgment interest on that sum, plus the sum of \$10,000 for the emotional harm she sustained as a result of the discriminatory conduct of respondent and in accordance with §49-2-506(1)(b), MCA.

4. The current circumstances of the respondent, specifically the fact that Russell Anderson is now retired and is not an employer, indicate that no additional affirmative relief is warranted or necessary in this case.

5. Janette Martin is the prevailing party in this case for purposes of X49-2-505(4), MCA.

VI.

ORDER

1. Judgment is found in favor of the charging party, Janette Martin, and against the respondent, Russell Anderson, on the charge that respondent created, maintained and condoned a hostile work environment which discriminated against charging party because of her sex and caused her termination on August 12, 1992.

2. Judgment is found in favor of the charging party and against respondent on the charge that respondent discriminated against the charging party in the terms of her compensation while employed at the Sportsmen Bar because of her sex.

3. Respondent Russell Anderson is ordered to pay to the charging party the sum of \$27,960 for the harm caused to the charging party by the above described unlawful discriminatory practices, with interest at the rate of 10% simple interest per annum (\$233 per month) from December 22, 1995 until paid.

4. Respondent Russell Anderson is ordered to refrain from engaging in any conduct which discriminates against any person in violation of the employment provisions of the Montana Human Rights Act, including conduct which creates, tolerates or condones a work environment which is hostile or abusive to an employee of the respondent because of his or her gender.

DATED this 27th day of June 1996.

S. Jane Lopp, Chair ,
Montana Human Rights Commission

Commissioners Etchart, Ogren, Stevenson and Svee concur

CERTIFICATE OF SERVICE

The undersigned employee of the Montana Human Rights Commission certifies that a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER was mailed to the following persons by U.S. Mail, postage prepaid, on this 27th day of June, 1996:

Timothy McKeon or Steve Carey
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Montana Human Rights Commission